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I. INTRODUCTION

What Is Command Control?

In our present society, command control of the military criminal system is a term discussed by many, feared by some and understood by few. The American public exhibits indifference to the military justice system until there is a great influx into the service of the draftee or so-called "citizen soldier." The problem is compounded by the ignorance of the public and many military personnel of the functioning of the military criminal system. To the civilian, command control is an ever present evil of military society. It is the means by which the commander insures that an accused is summarily convicted of a crime and sentenced according to the dictates of the commander. Unfortunately, this concept is also held by some uninformed military personnel.

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Such a misconception is understandable since command control, most commonly expressed as "command influence," is difficult to define.

> The phrase "command control" is vague and indefinite to those not close to the picture. . . . The same commanding officer is empowered to accuse the defendant, to draft and direct charges against him, to select the prosecution and defense counsel from officers under his command, to review and alter the court's decision, and to change any sentence imposed.[1]

Although the complete accuracy of this statement may be questioned, it represents the general view of command control.

The commander has been empowered by Congress to perform certain judicial functions.[2] The exercise of these judicial functions may be termed command control of the courts-martial process. Thus it must be recognized that command control is an integral part of our military criminal system. Only when a commander improperly exercises his judicial functions and enters forbidden areas does that control become unlawful. It is this unlawful command control that has resulted in the public challenge to the military judicial system.

Although command influence is the most common phrase employed to describe the commander's exercise of his judicial functions, command control will be used wherever possible throughout this article since it more accurately describes the nature of these functions.

Criticism of Command Control

Criticism has a legitimate role in the development of any justice system.[3] In the area of command control, a commentator made the allegation that " . . . the convening authority decides whether to bring charges, appoints the judge, both the prosecution and defense

1. *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Forces*, 81st Cong., 1st Sess. 640 (1949) (statement by Richard H. Wels, Chairman of Spec. Comm. on Military Justice of N.Y. County Lawyers Association) [hereinafter cited as *1949 Hearings*].

2. *See* Hansen, *Judicial Functions for the Commander?*, 41 MIL. L. REV. 20 (1968).

3. Hodson, *Introduction, Is there Justice in the Military?*, in *Administration of Military Justice*, Prepared for use at the Program of the Criminal Law Section, A.B.A. 1 (11 Aug. 1970).

counsel, the court members and reviews the case."[4] The Code attempts to prohibit the exercise of unlawful command control.[5]

Congress attempted to establish the means necessary to enforce these prohibitions by providing in pertinent part:

> Any person subject to this chapter who . . . (2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused; shall be punished as a court-martial may direct.[6]

In the past, the military services have ignored this provision. Judge Quinn, Chief Judge of the Court of Military Appeals, has pointed out that although there is no reason to ignore the provision of the Code, there are no reported cases of prosecution for unlawful command control.[7] One civilian writer expressed his opinion to the general public as follows:

> Not until 1969 was the *MANUAL for COURTS-MARTIAL* amended to outlaw a military commander's giving the court members "pre-

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4. Moyer, *Procedural Rights of the Military Accused: Advantages over a Civilian Defendant*, 22 ME. L. REV. 105 (1970).

5. Uniform Code of Military Justice art. 37, 10 U.S.C. § 837 (1970) [hereinafter cited as UCMJ], provides:

> (a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.
>
> (b) In the preparation of effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment of transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member as a member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

6. UCMJ art. 98, 10 U.S.C. § 898 (1970).

7. *Joint Hearings on S. 749 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary and a Special Subcomm. on Armed Services, United States Senate*, 89th Cong., 2nd Sess. (1966) [hereinafter cited as *1966 Hearings*].

> trial orientation"—which is an euphemism for letting the court members know which way he wants their verdicts to go. Whether or not the practice will be really outlawed is yet to be seen. A commander who violates this can only be court-martialed, and where is the higher officer who will hold him officially accountable for doing what virtually all officers believe a necessity . . .[8]

Referring to several instances of possible violations of Article 37, Judge Ferguson has recommended providing for mandatory dismissal of any officer who attempts to pervert justice and has suggested that violations of the Code constituting unlawful command control should be punishable in federal courts under Title 18, United States Code.[9] The failure to prosecute for unlawful command control has not been unnoticed by Congress and has evoked the comment that "The 1968 law contains language purporting to prohibit this form of influence, but it has proven wholly unenforcible."[10]

The authority of the commander to appoint the court has been the subject of continuous criticism. Speaking for the majority of the Supreme Court, Mr. Justice Douglas stated,

> . . . the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger.[11]

The appointment of defense counsel has been an area of criticism. Congress has noted allegations from former Judge Advocate officers that defense counsel who were too aggressive have been given other duties, that in some instances defense counsel were the least experienced counsel available and as they became more experienced were appointed the duty of prosecuting cases.[12] Judge Quinn admitted to Congress that, although defense counsel does a very good job, the most brilliant lawyers the Court of Military Appeals has seen appear on the side of the government.[13]

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8. SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC, 77 (1970).
9. *1966 Hearings* at 303.
10. 116 CONG. REC. 28711 (1970) (remarks of Senator Goodell).
11. O'Callahan v. Parker, 395 U.S. 258, 264 (1969).
12. *Joint Hearings on S. Res. 260 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary and a Special Subcomm. on Armed Services, United States Senate*, 87th Cong., 2d Sess. (1962) [hereinafter cited as *1962 Hearings*].
13. *Id.* at 184.

The military judiciary has not escaped critical observation when compared to federal courts.

> . . . conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in Federal courts. For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals.[14]

The convening authority's review of the case after trial has been criticized. It is argued that since he refers the case to trial he has already passed judgment upon the accused.[15] Further, it has been pointed out that the process of review results in severe sentences by the court.

> What is objectionable is the resulting practice whereby the court imposes an excessively severe sentence upon the assumption that the commanding officer who convenes the court will reduce it to an extent that he will consider just and conducive to the maintenance of discipline.[16]

The entire concept of command control has been under such serious attack as to generate the following comment concerning its prohibition:

> . . . the process of forbidding command influence in a hierarchial body is a bit like the development of weapons and counterweapons: No matter how good a particular weapon, there will ultimately be developed an effective defense thereto, and no matter how effective any defense, there will ultimately be found a new weapon to overcome it.[17]

One public critic has presented this picture:

> Courts-martial are the responsibility of the commander and so every trial is, in a sense a test of his disciplinary policy. The commander is in complete control of the machinery; he decides whether to bring charges, he appoints the court (similar to a civilian jury), the law officer (judge), and the trial counsel (prosecution), and the defense counsel from among his junior officers and he reviews the sentence with power to reduce or waive it. It is a little

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14. Toth v. Quarles, 350 U.S. 11, 17-18 (1955).
15. *See* Sherman, *Military Injustice,* THE NEW REPUBLIC, 9 Mar. 1968 at 21.
16. Keeffe & Moskin, *Codified Military Injustice,* 35 CORNELL L.Q. 169 (1949).
17. *1966 Hearings* at 314.

> like having a district attorney act as grand jury, select the judge, both attorneys and jury from his staff, and then review the sentence on appeal. The Code, in an attempt to preserve a fair trial forbids commanders from influencing the action of a court-martial but the possibility that a junior officer can banish the influence of his commander (who rules him and controls his assignments) is about as likely as a senator not being influenced by accepting large gifts.[18]

The views presented are merely a small sampling of the criticism of command control. The fact that criticism is not always objective or does not agree with personal viewpoint is not important. The result of criticism led to the following comment by the Judge Advocate General of the Army:

> Although much of this criticism is neither objective nor constructive, it cannot be ignored, because it has created a belief in the minds of a sizable segment of our population that the system of military justice is unfair, that a soldier loses his constitutional rights when he puts on the uniform of his country. The military lawyer, no less than his civilian colleague, must be ever alert to currents of contemporary beliefs and thought, for, to exist, a system must not only be good, but those affected by it must believe it is good.[19]

Scope of Analysis

The purpose of this article is not to attempt to rebut criticism of command control, but rather to explore limitations upon the role of the commander in the military justice system. An examination will be made of the commander's disciplinary policies and limitations placed upon the formulation of those policies. What control can the commander exercise over the prosecutorial discretion of subordinate court-martial authorities? Can he control his subordinates in their handling of disciplinary problems? Can he properly reserve or withdraw court-martial authority from subordinate commanders as a device of command control?

An analysis will be made of the prohibition against an accuser convening courts-martial including the tests applied by the Court of Military Appeals. Who can convene the court when the original convening authority is the accuser?

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18. Sherman, *Military Injustice,* THE NEW REPUBLIC, 9 Mar. 1968 at 21.
19. Hodson, *Introduction, Is There Justice in the Military?,* in *Administration of Military Justice,* Prepared for use at the Program of the Criminal Law Section, A.B.A. 1 (11 Aug. 1970).

Command control over personnel of the court will be examined. Is the commander unfettered in detailing trial and defense counsel, court members and the military judge? What control can be exercised over personnel after they have been detailed to a court?

An examination will be made of command control over initial review of the case. A summary of proposed legislation as it relates to command control is set forth.

Although portions of this article are academic and theoretical, particularly the area dealing with withdrawal and reservation of court-martial authority, it will serve as a consolidated starting point for those confronted with problems of command control.

II. Establishing Disciplinary Policy By Command Directives

General.

A commander's authority to establish disciplinary policy was recognized in early cases under the Code. The United States Court of Military Appeals has pointed out that a " . . . commander has plenary power over his subordinate officers regarding command functions."[20] Disciplinary policy is a commander's regulatory authority for maintenance and improvement of discipline for effective fulfillment of his assigned mission.[21] In a case involving a Navy policy directive, Judge Ferguson commented, "We do not condemn general service policies and pronouncements. It is a commander's prerogative to determine such policies and to promulgate them as he sees fit."[22] In another case, the court stated:

> . . . [T]he responsibility of a commanding officer for the maintenance of discipline within his command and the proper conduct of courts-martial cannot be questioned. In matters of discipline, failure to curb the unlawful tendencies of subordinates may demonstrate lack of capacity to command.[23]

A commander is not unfettered in the formulation of the policy directives he may issue. It is one thing for a commander to announce a general policy and yet another to use that power to influence the findings and sentence in a particular case.[24] A policy directive that tends to control directly the judicial processes rather than merely attempting to improve the discipline of the command

20. United States v. Gray, 6 U.S.C.M.A. 615, 620, 20 C.M.R. 331, 336 (1956).
21. United States v. Hawthorne, 7 U.S.C.M.A. 293, 299, 22 C.M.R. 83, 89 (1956).
22. United States v. Estrada, 7 U.S.C.M.A 635, 638, 23 C.M.R. 99, 102 (1957).
23. United States v. Isbell, 3 U.S.C.M.A. 782, 786, 14 C.M.R. 200, 204 (1954).
24. United States v. Littrice, 3 U.S.C.M.A. 487, 13 C.M.R. 43 (1953).

enters the realm of unlawful command control.[25] A policy statement cannot be made mandatory upon subordinate commanders; it must leave them free to follow or disregard the directive in the exercise of their judicial discretion.[26] Although a directive may not be mandatory by its terms, an interpretation by a commander that it is mandatory results in unlawful command control.[27] A directive cannot remove a commander's judicial discretion by requiring elimination of sex perverts[28] or requiring a punitive discharge for regular army offenders who have two or more previous convictions.[29] A commander cannot attempt to influence the action of a court on a particular case.[30]

On the other hand, it has been held that a superior commander may return a matter to a subordinate commander for "appropriate disposition under your jurisdiction."[31] A commander's comments at a staff and commanders' conference outlining measures to prevent future incidents but insisting upon a fair trial for an accused has been held not to constitute unlawful command control.[32] A policy directive on self-inflicted wounds calling for review of basic principles of leadership and providing for initiation of flagging action to insure completion of disciplinary action when a self-inflicted wound occurred was held a valid exercise of command responsibility; the directive also indicated that the superior commander would review all cases paying particular attention to indications that leaders had not done their job properly.[33] Although some terms of a directive might be taken to indicate to the contrary when read out of context, the court will consider the directive when read as a whole to determine if the promulgating officer strays beyond the limits of his responsibility of command.[34]

Thus, a commander may issue policy directives that do not interfere with judicial processes. Attempts to control the action of a

25. United States v. Hawthorne, 7 U.S.C.M.A. 293, 22 C.M.R. 83 (1956).
26. *Id.*
27. United States v. Doherty, 5 U.S.C.M.A. 287, 17 C.M.R. 287 (1954).
28. *Id.*
29. United States v. Hawthorne, 7 U.S.C.M.A. 293, 22 C.M.R. 83 (1956).
30. United States v. Cole, 17 U.S.C.M.A. 296, 38 C.M.R. 94 (1967).
31. United States v. Ginyard, 36 C.M.R. 683, 685 (1966), *rev'd on other grounds*, 16 U.S.C.M.A. 512, 37 C.M.R. 132 (1967).
32. United States v. Hurt, 9 U.S.C.M.A. 735, 27 C.M.R. 3 (1958).
33. United States v. Harrison, 19 U.S.C.M.A. 179, 41 C.M.R. 179 (1970).
34. *Id.*

particular court are unlawful. The test of command control over the judicial process is not whether the directive is mandatory but whether it is interpreted as mandatory by the subordinate commander.

The Commander's Prosecutorial Discretion

1. *Command Control Over Reference to an Inferior Court.*

A commander's control over the court-martial system extends through the chain of command to subordinate commanders charged with certain responsibilities in the disposition of court-martial charges.[35] He may issue policy directives emphasizing serious disciplinary problems, but such directives become unlawful command control when they directly tend to control judicial processes rather than merely attempt to improve discipline within the command.[36] In *United States v. Hawthorne*,[37] an Army commander issued a policy directive providing that, as a general rule, any charges against a regular army soldier with two or more previous convictions should be referred to a general court-martial in order that paragraph 127, Section B, *Manual for Courts-Martial*, could be utilized.[38] The charges against the accused, a regular army soldier with three previous convictions, were forwarded by the commanding officer, who, in the letter of transmittal, recommended trial by general court-martial in view of the policy. Intermediate commanders concurred in the recommendation. Setting aside the conviction, the Court of Military Appeals held that the commander having summary court-martial jurisdiction has substantial discretion in determining whether charges should be disposed of administratively or by court-martial. The policy directive was an exercise of unlawful command control since it attempted to control judicial processes, denying the accused's immediate and intermediate commanders of their discretionary power to reach an independent decision in the disposition of the case.

In *United States v. Sims*,[39] a battalion commander had referred an AWOL case to a special court-martial. The next higher com-

35. United States v. Gordon, 33 C.M.R. 489, *rev'd on other grounds*, 14 U.S.C.M.A. 314, 34 C.M.R. 94 (1963).

36. *Id.*

37. 7 U.S.C.M.A. 293, 22 C.M.R. 83 (1956).

38. MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 127, § B (rev. ed. 1969) [hereinafter cited as MCM 1969]. The pertinent part of the Manual authorizes a bad conduct discharge when an accused is found guilty of an offense where no discharge is authorized, upon proof of two or more previous convictions within three years preceding the commission of the offense.

39. 22 C.M.R. 591 (1956).

mander attended a conference held by the division commander who expressed concern over the AWOL rate and stated that repeated offenders could be tried by general court-martial. The repeated offender could then be separated from the service with a dishonorable discharge. On the same day as the conference, the intermediate commander directed that the accused be tried by general court-martial. The battalion commander withdrew the charges from the special court and ordered the required investigation. Although the investigating officer recommended trial by special court, the case was forwarded to the division commander. It was referred for trial by general court-martial one day after the division commander's conference remarks had been formalized into an express policy that "all cases" of third offenses of absence without leave "will be" tried by general courts-martial. Although nothing was found legally objectionable concerning the conference announcement, the fixed policy was held to interfere directly with fair and impartial pretrial proceedings. Neither the company commander nor the battalion commander was free to exercise his own discretion in the disposition of the case. The original recommendations were not only overruled, but the commanders were placed in a position where they had to change the original recommendations from trial by inferior court to trial by general court-martial.

The exercise of unlawful command control is not limited to a superior convening authority. A battalion executive officer's action convincing a company commander to recommend trial by general court-martial, even though he had initially and possibly improperly recommended imposition of nonjudicial punishment, has been held an unlawful exercise of command control depriving the accused of the independent recommendation of his immediate commander.[40]

Command control of a subordinate commander's prosecutorial discretion is strictly limited. This limitation includes control of subordinate commanders' recommendations concerning the choice of forum for a particular case. A superior commander may properly issue directives designed as recommendations to his subordinates. When these directives are interpreted as mandatory they enter the prohibited area of unlawful control of the judicial proc-

40. United States v. Charleson, 26 C.M.R. 630 (1958).

esses. Additionally, an attempt to coerce or unlawfully control a subordinate convening authority with respect to his judicial acts is prohibited; however, the prohibition against the use of censure, reprimand, admonishment, low efficiency ratings, transfers, prevention of grade advancement and elimination from the armed forces is noticeably absent from the Code provision which applies to convening authorities.[41]

2. *Improper Imposition of Nonjudicial Punishment.*

A superior commander may be concerned with the improper imposition of nonjudicial punishment for an offense which he considers properly triable by courts-martial. In this area command control is virtually unrestricted. In *United States v. Wharton*,[42] involuntary manslaughter charges were preferred against the accused and investigated pursuant to Article 32 of the Code. The investigating officer recommended imposition of nonjudicial punishment which was imposed by the officer exercising general courts-martial jurisdiction. Thereafter, the punishment was set aside by a superior commander who directed that charges be preferred. Disagreeing with the investigating officer's recommendation of trial by special court-martial, the superior authority referred the charges for trial by general court-martial. It was held that an accused has a right to proper pretrial procedure including the exercise of discretion by inferior commanders in disposing of charges administratively or trial by the lowest court empowered to adjudge an appropriate sentence. The Board of Review indicated that this did not mean a superior commander was completely deprived of his right to control his subordinates in their handling of disciplinary problems.

In arriving at this conclusion the Board cited Judge Latimer's concurring opinion in *Hawthorne*:

> In various areas involving disciplinary problems—of which judicial procedure is a necessary part—the convening authority has certain powers of his own, and unless he exceeds his authority he has a right to control his subordinates without interference by this Court. One of his duties is to determine personally whether a given charge or group of charges warrant trial by general court-martial, and he may go to reasonable lengths to insure that commanders with less authority do not use their offices to nullify his choice of forum. To illustrate my views, I submit the following example: I believe division or comparable Navy and Air Force commanders may properly inform their subordinate commanders that they must not refer

41. *See* UCMJ art. 37, 10 U.S.C. § 837 (1970).
42. United States v. Wharton, 33 C.M.R. 729, *petition denied*, 14 U.S.C. M.A. 670, 33 C.M.R. 436 (1963).

> robbery, grand larceny, or narcotic cases to special courts-martial without obtaining his special permission. Special courts-martial may be convened by subordinate commanders, Article 23(a), Uniform Code of Military Justice, 50 USC sec. 587, and if their choice of forum cannot be circumscribed, then those officers commanding higher echelons might be seriously crippled in maintaining order and discipline in their command. On the other hand, the same commanders would have no right to inform members of general courts-martial that they must adjudge a sentence greater than that which could be given by special courts-martial if they found an accused guilty of any of the enumerated offenses. The determination of an appropriate sentence within the limits set by the President is a prerogative of the court-martial, and the law brooks no interference by commanders with that power. . . .[43]

Although this concurring opinion was employed in *Wharton*, the majority opinion of *Hawthorne* and the *Sims* decision represent the current law. The decision in *Wharton* turns upon the premise that nonjudicial punishment does not bar subsequent trial for other than minor offenses.[44] In the area of improper imposition of nonjudicial punishment, the question is not one of unlawful command control but whether such punishment is a bar to trial. Although a discussion of command control is utilized in *Wharton*, the case is not good precedent for this area of the law. Additionally, *Wharton* has not been cited in any other reported decision.

Withdrawal or Reservation of Authority to Convene Courts-Martial

With the implementation of the Military Justice Act of 1968, many staff judge advocates found it administratively convenient to reduce the number of special court-martial jurisdictions to which they were required to provide legal service. This reduction has been generally accomplished by withdrawal or reservation of special courts-martial authority by the superior commander.

Withdrawal or reservation of courts-martial authority is based upon the Manual provision which provides, in pertinent part,

> A superior competent authority may convene the court to try any other case in a subordinate command if he so desires (Art. 22(b)). Thus, if the exigencies of the service interfere with the prompt disposition of cases, a superior competent to convene general courts-martial properly may convene courts for the trial of cases arising in a subordinate command.[45]

43. *Id.* at 733, *quoting* 7 U.S.C.M.A. at 300, 22 C.M.R. at 290.
44. United States v. Wharton, 33 C.M.R. 729, *petition denied,* 14 U.S.C.M.A. 670, 33 C.M.R. 436 (1963).
45. MCM 1969, para. 5*a*(3).

In discussing special courts-martial convening authorities, the Manual is more specific:

> . . . .
> The power of the squadron or battalion commander to convene special courts-martial is subject to the power of superior competent authority to reserve to himself the right to convene these courts for any or all subordinate units and detachments in his command. (4) A subordinate commander may exercise his power to convene special courts-martial unless a competent superior reserves that power to himself and so notifies the subordinate.[46]

The Code is narrower and contains no provision for withdrawal or reservation of the authority to convene special courts-martial.[47]

A grant provided by statute to confer courts-martial authority cannot be delegated; and, it is contrary to law to purport to delegate this authority to a flag or general officer.[48] Clearly authority to convene courts-martial is conferred by Congress. Absent an express grant, it necessarily follows that such authority cannot be reserved or withheld except by Congress. No such grant is expressed in the Code. The principle is further borne out by the Court of Military Appeals:

> From an analysis of Article 23 . . . it is evident that Congress believed that special court-martial authority was an important power to be conferred sparingly. In subsections (1) through (6) *it specifically described the various types of command in which such authority was to vest by virtue of the fact of command alone.*[49]

The legal effect of an attempted reservation of courts-martial authority is not often litigated. In *Tallent*,[50] a superior authority had directed that cases of statutory rape not be tried by inferior courts-martial. The accused was convicted by summary court martial of statutory rape and sentenced to thirty days restriction to camp. Subsequently, the summary court-martial convening authority was informed by the area commander that the specification failed to state an offense and that the proceedings were null and void. A special order was issued setting aside the findings and sentence in accordance with the instructions of superior authority. At a general court-martial convened by the superior authority, the accused unsuccessfully asserted former jeopardy. In reversing the conviction, a Board of Review concluded that the specification before the summary court-martial did state an offense, the proceedings were complete and jeopardy had attached. The Board stated,

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46. *Id.* paras. 5*b*(3), (4).
47. UCMJ art. 23(b), 10 U.S.C. § 823(b) (1970).
48. United States v. Greenwell, 19 U.S.C.M.A. 460, 42 C.M.R. 62 (1970).
49. *Id.* at 463, 42 C.M.R. at 65 (emphasis added).
50. 7 B.R. (E.T.O.) 141 (1944) (C.M. 2550).

"[A]lthough the commanding officer was directed not to try cases of statutory rape by inferior courts-martial, such direction could not deprive the summary court-martial of jurisdiction conferred by statute."[51] At the time of the *Tallent* decision, the Manual provision was similar to that of the present Manual and provided,

> The subordinate commander may exercise the power to appoint special courts-martial for his command unless a competent superior deems it desirable to reserve that power to himself and so notifies the subordinate.[52]

It is concluded that the present Manual provision exceeds the authority of the Code and has no legal statutory basis.

The effect of an attempt by a superior to forbid trial by a court convened by a subordinate authority may well violate Article 37 of the Code as unlawful control of the action of a convening authority with respect to his judicial acts.[53] The proper action for the superior commander would seem to be to relieve a subordinate from command where it is clear that the subordinate abuses his prosecutorial discretion. This remedy is based upon the principle that court-martial authority is vested by virtue of the fact of command alone.[54] Any attempt by the superior authority to withdraw or reserve court-martial authority vested in a subordinate commander is a possible exercise of unlawful command control.

III. THE CONVENING AUTHORITY AS ACCUSER

General

A convening authority may take such a personal interest in a case that he becomes an accuser. This personal interest may result in unlawful command control since he can select the court and, as reviewing authority, pass upon the proceedings. The result of becoming an accuser may deprive a commander of the authority to convene the court-martial.

The prohibition against an accuser convening a court-martial was introduced into American military law by an act of 29 May 1830.[55]

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51. *Id.*
52. MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY, 1928, para. 5b.
53. UCMJ art. 37, 10 U.S.C. § 837 (1970). *See* note 5 *supra.*
54. United States v. Greenwell, 19 U.S.C.M.A. 460, 42 C.M.R. 62 (1970).
55. WINTHROP, MILITARY LAW AND PRECEDENTS, 61 (2d ed. rev. & enl. 1920) [hereinafter cited as WINTHROP].

The legislation was prompted by the trial of an Adjutant General by a court convened by the Commander of the Army, who preferred the charges, was the prosecuting witness, reviewed the case and approved the sentence.[56] The purpose of the accuser prohibition is to prevent unlawful command control of the court-martial.[57] Under the present Code, the restriction applies to general and special courts-martial.

> If any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered desirable by him.[58]

The restriction does not apply to trial by summary court-martial.[59] Where the summary court-martial convening authority is the accuser, the forwarding of the charges to superior authority is discretionary; the fact that the convening authority or summary court officer is the accuser does not invalidate the trial.[60] This archaic provision is apparently a reflection of the early accuser prohibition which did not apply to trials of enlisted personnel.[61]

The Code's definition of an accuser sets forth three separate categories: (1) A person who signs and swears to charges; (2) Any person who directs charges be signed and sworn by another; and (3) Any other person who has an interest other than an official interest in the prosecution of the accused.[62] An examination of the charge sheet readily reveals the accuser of the first category. The second category has been virtually ignored by the courts and has been included in the last category as cases of other than official interest in the prosecution of the accused.

In the early case of *United States v. Gordon*,[63] the accused was charged with burglary of a general officer's house and attempted burglary of another general officer's house, the latter coincidentally being the convening authority. The convening authority dismissed the specification for attempted burglary of his house. The accused was tried and convicted of the remaining offense. The Court of Military Appeals reversed the conviction concluding that the convening authority was an accuser and not competent to convene the court. It was announced that the test to be applied was whether the convening authority was so closely connected to the offense

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56. *Id.* at 62 n.33.
57. United States v. La Grange, 1 U.S.C.M.A. 342, 3 C.M.R. 76 (1952).
58. UCMJ arts. 22(b), 23(b), 10 U.S.C. §§ 822(b), 823(b) (1970).
59. UCMJ art. 24, 10 U.S.C. § 824 (1970).
60. MCM 1969, para. 5c.
61. WINTHROP, *supra* note 55, at 61 n.31.
62. UCMJ art. 1(9), 10 U.S.C. § 801(9) (1970).
63. 1 U.S.C.M.A. 255, 2 C.M.R. 161 (1952).

that a reasonable person would conclude that he had a personal interest in the matter.

This principle was applied at Department of the Army level in *United States v. Grow*.[64] The accused, a major general, was charged with violations of security regulations and dereliction of duty after photostats of his diary containing classfied material appeared in a communist publication. The Army Chief of Staff directed an investigation which was later submitted to the Office of the Judge Advocate General for preparation of appropriate charges. After charges were preferred and approved by the Chief of Staff and the Secretary of the Army, they were forwarded to the accused's immediate superior, an Army commander, for appropriate action. The accused contended that the Secretary of the Army and Chief of Staff were accusers and that the officer who preferred the charges was a nominal accuser. It was asserted that the case should have been forwarded to the next superior, the President. The Court held that in view of the serious nature of the charges and the rank and position of the accused, the decision to proceed with or prohibit disciplinary measures could be made only at the highest military level. The Court found that it could not be concluded that the interests of the Chief of Staff and Secretary of the Army were other than official.

The convening authority is not an accuser merely because he directed an investigation and an assistant staff judge advocate preferred the charges.[65] The danger of the application of the *Grow* reasoning is illustrated by a Board of Review decision.[66] After investigation, superior authority ordered that a squadron commander be charged with certain offenses arising out of cheating at cards. The Board held that due to the rank and position of the accused, the decision to proceed could only be made at the highest military level.

Considering this result the same principle can be applied to a ranking officer of any division or comparable unit. The difficulty can be observed readily if applied to a brigade or battalion where company grade officers occupy important positions. The result of

64. 3 U.S.C.M.A. 77, 11 C.M.R. 77 (1953).
65. United States v. Jewson, 1 U.S.C.M.A. 652, 2 C.M.R. 80 (1952).
66. United States v. West, 16 C.M.R. 587, *petition denied*, 4 U.S.C.M.A. 744, 20 C.M.R. 398 (1954).

such an improper application of this principle is a complete disregard for the prohibition against an accuser convening a court-martial.

Willful Disobedience Offenses and the Accuser Problem

A convening authority will become an accuser in a case which involves the willful disobedience of an order issued by him. In *United States v. Marsh*,[67] the accused was given a direct order to proceed to his assigned station. The order was issued "by command of" the convening authority. In setting aside the conviction because the convening authority was the accuser, the court stated,

> . . . the latter [convening authority] had a personal interest in seeing his orders were obeyed. Military disciple and order is based upon obedience to superiors and every commander jealously, but rightly, requires compliance and frowns on disobedience. For that and other reasons we cannot say that a superior officer would be entirely impartial in selecting a court to try a given case where the accused was charged with willful disobedience of the order.[68]

The convening authority does not become an accuser where the accused is charged with failure to obey his order. In *United States v. Keith*,[69] the accused was charged with failure to obey an order of the convening authority to proceed to a certain station. The Court held that the convening authority was not an accuser since there was no evidence of willful flaunting of his authority. He was not placed in a situation where his own personal direct order to a subordinate had been willfully challenged.

The convening authority does not become an accuser merely because he testifies for the prosecution. Where the convening authority testifies in order to authenticate records which are questioned at trial, he is not an accuser but may be disqualified from reviewing the case.[70] His status as an accuser is determined as of the time he convenes the court; his testimony determines whether he has a personal interest in the outcome of the case at the time he convened the court.[71]

Who Is Superior Competent Authority?

When the convening authority is an accuser, the case shall be convened by superior competent authority.[72] The Manual provides,

67. 3 U.S.C.M.A. 48, 11 C.M.R. 48 (1953).
68. *Id.* at 52, 11 C.M.R. at 52.
69. 3 U.S.C.M.A. 579, 13 C.M.R. 135 (1953).
70. United States v. McCleeny, 5 U.S.C.M.A. 507, 18 C.M.R. 131 (1955).
71. *Id.*
72. UCMJ arts. 22(b), 23(b), 10 U.S.C. §§ 822(b), 823(b) (1970).

> When any commanding officer who would normally convene the general court-martial is the accuser in the case, he shall refer the charges to a superior competent authority who will either convene the court or designate another competent convening authority who is superior in rank to that accuser . . . to exercise jurisdiction.[73]

This principle is applicable to trials by special courts-martial.[74] In *United States v. La Grange*,[75] a superior authority directed that an officer junior in rank to the accused convene the court. The designated officer was not in the same chain of command as the accused. The court held that the officer junior to the accused could not convene the court because competent superior authority, if not in the same chain of command, means an authority superior to the accused. The question of whether superior competent authority embraces only those officers who are senior both in rank and command has not been resolved by the Court.[76] A Board of Review has held that a superior authority must be superior under either of the alternative criteria.[77]

Criticism of Application of the Accuser Prohibition

In determining whether the convening authority is an accuser, the court has relied heavily on the test of personal interest. The nominal accuser provision of the Code has been virtually ignored. The result is that the convening authority can direct that charges be preferred against an accused.[78] A convening authority is not likely to act impartially with respect to a case in which he has directed that charges be preferred. The criticism that the convening authority prefers charges, selects the court members and reviews the findings and sentence of the court has some validity. In order to avoid the appearance of the evil of unlawful command control, a strict application of the accuser prohibition must be observed.

In the area of "disobedience" offenses, the distinction between willful disobedience and failure to obey appears to be a fiction. If it is sound reasoning that every superior requires compliance and

73. MCM 1969, para. 5a(3).
74. MCM 1969, para. 5b(2).
75. 1 U.S.C.M.A. 342, 3 C.M.R. 76 (1952).
76. United States v. Haygood, 12 U.S.C.M.A. 481, 482, 31 C.M.R. 67, 68 (1961).
77. United States v. Kostes, 38 C.M.R. 513 (1967).
78. *See* United States v. Wharton, 33 C.M.R. 729, *petition denied*, 14 U.S.C.M.A. 670, 33 C.M.R. 436 (1963).

frowns upon disobedience of his orders, the difference between willfulness and failure to obey is a matter of degree. The prohibition against an accuser convening the court should apply to both offenses.

The accuser prohibitions do not apply to trials by summary courts-martial. Thus under the Code a single officer of a unit who also has summary court-martial jurisdiction may prefer charges, act as summary court and review the findings and sentence. Such a provision is not only outdated, but may subject the military services to criticism. It has no proper place in a modern judicial system.

IV. Command Control Over Court Members

Detailing Court Members

The authority to convene courts-martial includes the authority to select the members who will serve on the court. This includes authority, subject to limitations, to detail trial counsel, defense counsel and a military judge.[79] With the creation of the independent judiciary, detailing of the military judge by the convening authority has become a mere formality. The authority to detail court members is an area where the commander exercises great control over courts-martial. Commanders have been known to select as court members personnel who are likely to follow the commander's desires rather than use independent judgment in deciding a case. Where three officers of a general court-martial were assigned as permanent members with the senior officer preparing efficiency reports on the other two, the Court of Military Appeals has indicated that the permanent aspect of the court membership made it appear packed.[80]

The detailing of a large number of members with the intent that only some will be present at each trial has been condemned as reflecting unfavorably on the dignity of the court, as giving a casual appearance to convening the court, and making it appear that a subordinate of the convening authority was selecting the composition of the court for trial.[81] A similar method was condemned in *United States v. Mclaughlin*[82] where the convening authority detailed a court consisting of a president and twelve members. By memorandum court sessions were scheduled with only three mem-

79. *See* UCMJ arts. 25-27, 10 U.S.C. §§ 825-27 (1970).
80. United States v. Deain, 5 U.S.C.M.A. 44, 7 C.M.R. 44 (1955).
81. *See* United States v. Allen, 5 U.S.C.M.A. 626, 18 C.M.R. 250 (1955); United States v. Andress, 11 C.M.R. 299 (1953).
82. 18 U.S.C.M.A. 61, 39 C.M.R. 61 (1968).

bers detailed to each session. All other members were considered excused by express consent of the convening authority. The court held the use of this method constituted an unlawful exercise of command control by seizing the power and responsibility conferred by statute upon the president of the court-martial. By the memorandum, the convening authority controlled the sessions of the court, the person presiding as president at each session and the members who would sit at each session. Control over the composition and function of a court-martial is a different matter from excusing one or more members from attending a particular trial for a proper reason.

An attempt has been made to clarify the prohibition of this practice by a provision that the convening order "should designate no more members than those who are expected to be present for trial of cases referred to the court which it convenes."[83]

The detailing of a lawyer as a member of a special court-martial where complicated issues of law may be presented was expressly permitted in the past.[84] That practice appears to be permissible although the provision has been deleted from the present Manual. The detailing of an attorney to the court in a simple factual case after the accused had retained civilian counsel "smack[ed] of court packing."[85]

A claim of discrimination was held to be without substance where no Negro had been detailed as military judge or court member for a two-year period.[86] The deliberate selection of a Negro as a court member for trial of a Negro accused has been upheld.[87]

The criteria for detailing members of the court is contained in the following Code provision:

> When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, *in his opinion*, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a

83. MCM 1969, para. 36*b*.
84. MANUAL FOR COURTS-MARTIAL, 1951, para. 4*d* [hereinafter cited as Mem 1951].
85. *See* United States v. Sears, 6 U.S.C.M.A. 661, 668, 20 C.M.R. 377, 384 (1956).
86. United States v. Swift, 17 U.S.C.M.A. 227, 38 C.M.R. 25 (1967).
87. United States v. Crawford, 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964).

> general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.[88]

This provision of the Code leaves the commander virtually unrestricted in the detailing of court members. By application of the use of the phrase "in his opinion," the statute can reasonably be interpreted to permit detailing of members who share the opinions of the convening authority. Decisions of the Court of Military Appeals have restricted the mode of selection but seem to reflect little concern with the personnel that compose the membership of a court.[89] Little restriction is placed upon command control of the detailing of membership of courts-martial.

Instructing the Court

Although the commander can select members of courts-martial who in his opinion are best qualified for such duty, it has not been unusual to attempt to control the processes of the court by instructing the members. This practice was encouraged by the 1951 Manual.

> A convening authority may, through his staff judge advocate or legal officer or otherwise, give general instructions to the personnel of a court-martial which he has appointed, preferably before any cases have been referred to the court for trial. When a staff judge advocate or legal officer is present with the command such instruction should be given through such officer. Such instruction may relate to the rules of evidence, burden of proof, presumption of innocence, and may include information as to the state of discipline in the command, as to the prevalence of offenses which have impaired efficiency and discipline, and of command measures which have been taken to prevent offenses.[90]

On review of cases alleging unlawful command control, the court has considered several factors in determining the issue. (1) Source of the instruction. The court has condemned lectures furnished by the staff judge advocate where he was superior in rank and, as a staff member, could reasonably have been considered a conduit for the desires of the convening authority.[91] This factor was exhibited by an assistant staff judge advocate who used a letter purporting to be a personal request for information but written on official stationery.[92] (2) Recipients of the instruction. Improper command

88. UCMJ art. 25(d)(2), 10 U.S.C. § 825(d)(2) (1970) (emphasis added).
89. *But see* United States v. Greene, 20 U.S.C.M.A. 232, 43 C.M.R. 72 (1970). The court condemned detailing of only colonels and lieutenant colonels as court members.
90. MCM 1951, para. 38.
91. *See* United States v. Zagar, 5 U.S.C.M.A. 410, 18 C.M.R. 34 (1955).
92. *See* United States v. Kitchens, 12 U.S.C.M.A. 589, 31 C.M.R. 175 (1961).

control was more likely to be found when given only to members of a court-martial[93] than when given to all officers of the command.[94] (3) Time relationship to the case in question. The Court condemned cases where the pretrial instruction occurred after the court convened[95] or immediately prior to trial.[96] Instructions given one to three months prior to trial were held not to constitute unlawful command control.[97] (4) Nature of the instruction. Instructions emphasizing that court members should not usurp the convening authority's prerogative,[98] that sentences have been too meager,[99] or lenient,[100] that careful pretrial investigation insures only a guilty person is tried,[101] and discussions of other acts of misconduct for which the accused will not be tried[102] have been held to constitute unlawful command control.

Although the Code permits general instructions concerning substantive and procedural aspects of courts-martial,[103] the Army has prohibited such lectures.[104] It has been recognized that regardless of the subject matter included in instructions given to a court there is still an appearance of evil and distrust created by the mere fact the instruction is given.[105]

Control by Use of Efficiency Reports

The efficiency or fitness report has been a commander's tool in exercising control over members of a court. In *United States v. Littrice*,[106] a commander's remarks that appropriate notations

93. *See* United States v. Wright, 17 U.S.C.M.A. 110, 37 C.M.R. 374 (1967); United States v. Littrice, 3 U.S.C.M.A. 487, 13 C.M.R. 43 (1953).
94. *See* United States v. Albert, 16 U.S.C.M.A. 111, 36 C.M.R. 267 (1966); United States v. Isbell, 3 U.S.C.M.A. 782, 14 C.M.R. 200 (1954). *But see* United States v. Hawthorne, 7 U.S.C.M.A. 293, 22 C.M.R. 83 (1956).
95. *See* United States v. Kitchens, 12 U.S.C.M.A. 589, 31 C.M.R. 175 (1961); United States v. Guest, 3 U.S.C.M.A. 147, 11 C.M.R. 147 (1953).
96. Cases cited note 91 *supra*.
97. *See* United States v. Danzine, 12 U.S.C.M.A. 350, 30 C.M.R. 350 (1961); United States v. Navarre, 5 U.S.C.M.A. 32, 17 C.M.R. 32 (1954).
98. United States v. Littrice, 3 U.S.C.M.A. 487, 13 C.M.R. 43 (1953).
99. United States v. Hunter, 3 U.S.C.M.A. 497, 13 CM.R. 53 (1953).
100. United States v. Williams, 11 U.S.C.M.A. 459, 29 C.M.R. 275 (1960).
101. United States v. Zagar, 5 U.S.C.M.A. 410, 18 C.M.R. 34 (1955).
102. United States v. McCann, 8 U.S.C.M.A. 675, 25 C.M.R. 179 (1958).
103. UCMJ art. 37(a)(1), 10 U.S.C. § 837(a)(1) (1970).
104. *See* Army Regulation 350-212 (16 May 1969).
105. United States v. Padilla, 30 C.M.R. 481, 486 (1960).
106. United States v. Littrice, 3 U.S.C.M.A. 487, 13 C.M.R. 43 (1953).

would be made in efficiency reports were held to result in prejudice to the accused. The court reasoned that an outstanding performance rating should apply equally to all military duties and no necessity existed to single out duty as a court-martial member. The action was considered to be a veiled threat; members who followed the directive and voted to convict and to impose a dishonorable discharge were to be commended while those who did not would go unnoticed.

The same instruction was examined in *United States v. Isbell.*[107] The reference to efficiency reports was held to be nonprejudicial since it was given prior to the time the offense was committed. In his dissenting opinion, Judge Brosman found little reason to distinguish between a veiled threat from a commander read to court members immediately before trial and one made known to most of the members prior to the commission of the offense.

In *United States v. Navarre*[108] the commanding officer's instructions made reference to a commander who gave lower efficiency ratings to an officer as a result of his performance as a member of a court-martial. The Court considered the reference to efficiency reports as predicated wholly upon an individual's failure to be governed by the guiding norm of our system of equal justice under the law. Considering the fact that the comment was made three months prior to the court-martial, unlawful command control was not found.

An extreme example of improper command control appeared in *United States v. Deain.*[109] Three officers of a general court-martial were permanent members with the senior officer, a rear admiral, assigned the duty of preparing and submitting efficiency reports on the other two members. To aggravate matters, the senior member stated on several occasions that personnel sent to trial must be guilty of something. On voir dire he indicated that he did not recognize the presumption of innocence as a constitutional right since he did not regard military personnel as possessing any constitutional rights other than those which may have been duplicated by specific grants of Congress. Commenting upon fitness reports the court stated:

> . . . A court member's freedom and independence of action must remain inviolate. For his actions and his motives he should be responsible only to God and his conscience. Danger of infringement of these rights is generated by the fitness report here.[110]

107. 3 U.S.C.M.A. 782, 14 C.M.R. 200 (1954).
108. United States v. Navarre, 5 U.S.C.M.A. 32, 17 C.M.R. 32 (1954).
109. 5 U.S.C.M.A. 44, 17 C.M.R. 44 (1954).
110. *Id.* at 53, 17 C.M.R. at 53.

By the Military Justice Act of 1968, Congress attempted to prohibit the consideration of an individual's performance as a member of a court-martial in preparing effectiveness, fitness or efficiency reports.[111] Although such an attempt is commendable, it does not take into consideration the more subtle methods a commander may use in preparing such reports. A rating officer who may be inclined to violate the prohibition is not likely to express the actual reasons for his rating and no doubt will be able to find legitimate reasons to accomplish his purpose. Since there have been no reported cases of prosecution for a violation of Article 98 of the Code, there is little reason to believe such a violation will be prosecuted in the future.

V. COMMAND CONTROL OVER COUNSEL FOR COURTS-MARTIAL AND THE MILITARY JUDGE

The Trial Counsel

A commander has the statutory duty to detail trial counsel for the prosecution of a case. The commander can properly exert much more control over the trial counsel than the defense counsel. In *United States v. Haimson*,[112] instructions, addressed to the trial counsel were signed over the command line of the convening authority. A sworn statement by an assistant staff judge advocate indicated that the instructions to the trial counsel were prepared under his direction, approved by the staff judge advocate and signed by an assistant adjutant. The indorsement advised trial counsel that he should make a brief opening statement, what witnesses should be called, what testimony should be elicited, what documents were available, that witnesses might refuse to testify based upon the privilege against self incrimination, that he should submit requests for instructions and that if the accused were found guilty and presented evidence in mitigation, he could properly present evidence in aggravation. In holding the convening authority was not an accuser the court reasoned that the substance of the directive was controlling. There was nothing in the content of the directive to suggest that the convening authority or the members of his staff had predetermined the accused's guilt or innocence, nor

111. UCMJ art. 37(b), 10 U.S.C. § 837(b) (1970).
112. 5 U.S.C.M.A. 208, 17 C.M.R. 208 (1954).

was there anything reflecting a personal interest on the part of the convening authority in the outcome of the trial.

The staff judge advocate has considerable latitude in controlling the conduct of trial counsel during the trial. Although he is almost unrestricted in the instructions he may give to trial counsel concerning a particular case, he cannot give instructions which are clearly in violation of law. In *United States v. Kennedy*,[113] trial counsel had joined with the defense in a motion to dismiss for insufficient evidence since the prosecution's chief witness was hostile and noncommital. The staff judge advocate ordered trial counsel to move for a continuance to allow sufficient time to threaten and coerce the witness into testifying. The court termed the order unlawful. The use of command control to intimidate, tamper with, or influence the testimony of a witness is unlawful.[114]

Trial counsel may be given detailed instructions for the prosecution of his case so long as they are labeled "suggestions."[115] It is only necessary that they do not reduce trial counsel to an automoton.[116] The convening authority may direct trial counsel to change a specification to conform with the evidence.[117] It is not unlawful command control to order the trial counsel to abandon a motion to withdraw a specification since, to do otherwise, would nullify the power of the convening authority to refer a case to trial.[118]

Trial counsel may be the vehicle through whom command policy may be conveyed improperly to members of the court. Thus, it has been held improper for trial counsel, in argument on sentence, to refer to departmental instructions setting forth the policy on retention of those convicted of offenses involving moral turpitude.[119] Cautionary instructions may not purge the prejudice to the accused resulting from such an argument.[120]

Unlawful command control may be interjected into the proceedings at trial by arguing on sentence that the convening authority undoubtedly thought the accused should receive a punitive discharge and confinement commensurate with the offense.[121] At a rehearing it has been held prejudicial for trial counsel to enter into

113. 8 U.S.C.M.A. 251, 24 C.M.R. 61 (1957).
114. United States v. Long, 2 U.S.C.M.A. 60, 6 C.M.R. 60 (1952).
115. United States v. Mallicote, 13 U.S.C.M.A. 19, 32 C.M.R. 374 (1962).
116. United States v. Haimson, 5 U.S.C.M.A. 208, 27 C.M.R. 208 (1954).
117. United States v. Overton, 14 C.M.R. 489 (1954).
118. United States v. Burke, 7 C.M.R. 745, *petition denied*, 2 U.S.C.M.A. 688, 7 C.M.R. 84 (1952).
119. United States v. Fowle, 7 U.S.C.M.A. 349, 22 C.M.R. 139 (1956).
120. United States v. Allen, 20 U.S.C.M.A. 317, 43 C.M.R. 157 (1971).
121. United States v. Lackey, 8 U.S.C.M.A. 718, 25 C.M.R. 222 (1958).

evidence a record of previous conviction also showing the convening authority had criticized a previous court for not adjudging a punitive discharge.[122] An argument on sentence that the convening authority had already reduced the punishment by referring the case to a special court-martial and that the maximum punishment for the offenses was more than a special court-martial could impose has been held to be prejudicial.[123]

Defense Counsel

The detailing of defense counsel is the statutory duty of the convening authority and is subject to few limitations.[124] The selection is shared with the accused who may request military counsel of his own choice if reasonably available or who has a right to be represented by civilian counsel at the accused's expense.[125] An appeal procedure to the next higher commander is contemplated where requested military counsel has been determined not reasonably available.[126]

Reported cases of the unlawful exercise of command control are rare. In *United States v. Dobr*,[127] an order that counsel would not, for security reasons, present evidence, motions or argument based upon the accused's activities for several years prior to his offense was held to be prejudicial to the substantial rights of the accused.

Although a commander has broad discretion in detailing counsel from among those eligible within his command, once counsel has been detailed the commander loses a great deal of control over that officer. The relieving of a defense counsel who apparently would not agree to admission of a deposition taken under questionable circumstances was condemned because the relief of original counsel, coupled with the change of tactics by new counsel, raised substantial doubt if the accused was afforded a fair trial.[128] The court has stated its position concerning unlawful command control of the defense counsel in the following terms:

> . . . [H]e has a solemn duty to defend unreservedly the interests of the accused he has sworn to protect, and fear of disfavor should

122. United States v. Coffield, 10 U.S.C.M.A. 77, 27 C.M.R. 151 (1958).
123. United States v. Crutcher, 11 U.S.C.M.A. 483, 29 C.M.R. 299 (1960).
124. UCMJ art. 27, 10 U.S.C. § 27 (1970); MCM 1969, para. 6.
125. UCMJ art. 38(b), 10 U.S.C. § 838(b) (1970); MCM 1969, para. 48.
126. MCM 1969, para. 48.
127. 21 C.M.R. 451 (1956).
128. United States v. Plant, 8 C.M.R. 384 (1953).

> not deter him from using all honorable means to protect his client's cause. No system of justice can flourish if the representation afforded an accused person is to be neglected because of fear of reprisals. Nor can military justice succeed if those officers who must defend an accused inadequately protect him because they dare not assert every right guaranteed him by the Code.[129]

Superiors have not been unwilling to use the efficiency report as a method of control over a defense counsel.[130] As a result superiors are prohibited from giving a less favorable effectiveness, fitness, efficiency, other report or document for the purpose of advancement in grade, assignment or transfer of any defense counsel because of the zeal with which defense counsel represented any accused before a court-martial.[131] This statutory prohibition provides little protection to counsel since a superior inclined to give a less favorable rating is not likely to use the prohibited subject matter as the basis. The prohibition will provide little comfort to a defense counsel who has knowledge of the fact that prosecution of the superior who violates the provision is unlikely.

An accused's right to be represented by detailed military defense counsel is fundamental to due process.[132] The relationship between an accused and appointed counsel may not be severed for administrative convenience.[133] Mere change of duty station is not sufficient reason to replace detailed defense counsel over the objection of the accused.[134]

The Military Judge

With the enactment of Article 26, Uniform Code of Military Justice, the basic step was taken toward making the military judge comparable to a federal judge. Two basic areas remain within the proper control of the convening authority. First, the military judge has no authority over a particular case until he is detailed to a court by specific orders and the case is referred for trial. Second, certain rulings involving questions of law may be appealed by the prosecution to the convening authority and the military judge must accede to his view.[135]

A court-martial does not exist until convened by a person empowered to convene it.[136] A military judge does not become part

129. United States v. McMahan, 6 U.S.C.M.A. 709, 717, 21 C.M.R. 31, 39 (1956).
130. *1966 Hearings* at 303.
131. UCMJ art. 37(b), 10 U.S.C. § 837(b) (1970).
132. United States v. Tavolilla, 17 U.S.C.M.A. 395, 38 C.M.R. 193 (1968).
133. United States v. Tellier, 13 U.S.C.M.A. 323, 32 C.M.R. 323 (1962).
134. United States v. Murray, 20 U.S.C.M.A. 61, 42 C.M.R. 253 (1970).
135. UCMJ art. 62(a), 10 U.S.C. § 862(a) (1970); MCM 1969, para. 67*f*.
136. *See* MCM 1969, para. 8.

of a court until detailed by orders and, unlike his civilian counterpart, has no authority over a case until so detailed. Once detailed his duties relate generally to presiding over open sessions of the trial.[137] Prior to reference of the case to a court, judicial functions remain a duty of the convening authority. It is questionable whether a military judge can authorize a search without approval of the Judge Advocate General or his designee.[138] A military judge will not be comparable to a federal judge until he is granted similar authority.

The convening authority is permitted by statute to return a ruling on a motion to dismiss not amounting to a finding of not guilty to a court for reconsideration of the judge's ruling. In cases involving questions solely of law, the military judge must accede to the view of the convening authority.[139] This practice is normally the function of appellate courts. Although appellate judges are lawyers and, generally convening authorities are not, Congress has invested the convening authority with judicial power and responsibilities in connection with the administration of military criminal law.[140] The procedure has been held not to violate military due process. Certain anomalies in military practice exist in comparison with procedures in the federal civilian courts but a difference of procedure is not tantamount to a due process defect.[141] There is no constitutional impediment to Congress investing a convening authority with certain judicial powers in relation to the administration of military justice simply because he is not trained in the law.[142]

The Court has held that the convening authority can return a charge which has been dismissed for lack of speedy trial.[143] However, the convening authority cannot direct trial to proceed after a continuance has been granted since this would enable him to exercise unlawful command control over the proceedings.[144] An appeal of a ruling under Article 62(a) is not an unlawful intrusion into the

137. *See* MCM 1969, para. 39.
138. UCMJ arts. 26(a), (c), 10 U.S.C. §§ 826(a), (c) (1970).
139. UCMJ art. 62(a), 10 U.S.C. § 862(a) (1970); MCM 1969, para. 67*f*.
140. United States v. Nix, 15 U.S.C.M.A. 518, 36 C.M.R. 76 (1965).
141. United States v. Turkali, 6 U.S.C.M.A. 340, 20 C.M.R. 56 (1955).
142. Priest v. Koch, 19 U.S.C.M.A. 293, 41 C.M.R. 293 (1970).
143. United States v. Boehm, 17 U.S.C.M.A. 530, 38 C.M.R. 328 (1968).
144. United States v. Knudson, 4 U.S.C.M.A. 587, 16 C.M.R. 161 (1954).

court proceeding; and, the convening authority does not deny the accused a fair trial even though he has referred that specification to trial.[145]

At present Article 62(a), Uniform Code of Military Justice, is a method whereby the commander may properly exercise command control over the military judge of a court-martial. With the advent of the military judge in military criminal law, this provision appears to be unwarranted and archaic. It undermines the authority of the military judge and could well appear to those outside the service to be an unnecessary intrusion by the commander into trial proceedings.

VI. Command Control Over Review of Courts-Martial

The convening authority's power to act upon the findings and sentence of a court-martial is a proper exercise of command control. Control is not limited to the authority who convenes a court but may also be exercised by his superiors. When a superior's action interferes with the personal discretion required of a convening authority, such action may be termed unlawful command control.

The findings and sentence of a court-martial have been termed mere recommendations to the authority convening the court.[146] This view is not without merit since the convening authority has the independent duty to weigh the evidence, judge the credibility of witnesses and determine controverted questions of fact.[147] He must determine the appropriateness of the sentence although he cannot increase it.[148] He is not bound by the opinions of the finders of fact[149] and must be satisfied that the accused is guilty beyond a reasonable doubt.[150]

In *United States v. Duffy*,[151] the staff judge advocate found reversible error based upon the improper use of an inadmissible confession. The convening authority disapproved the staff judge advocate's recommendation indicating that he was loath to permit a guilty man to escape just punishment because of a technical failure. The court termed the convening authority's concept as "repugnant to elementary justice" and said it was "not only unlawful; it was lawless."[152]

145. Priest v. Koch, 19 U.S.C.M.A. 293, 41 C.M.R. 293 (1970).
146. Winthrop, *supra* note 55, at 447.
147. MCM 1969, para. 87.
148. MCM 1969, para. 88*a*.
149. *See* United States v. Johnson, 8 U.S.C.M.A. 173, 23 C.M.R. 397 (1957).
150. United States v. Grice, 8 U.S.C.M.A. 166, 23 C.M.R. 390 (1957).
151. 3 U.S.C.M.A. 20, 11 C.M.R. 20 (1963).
152. *Id.* at 23, 11 C.M.R. at 23.

The commander faces a greater problem when reviewing the sentence of a court-martial. As convening authority his action must be independent but he is permitted to consider information from outside the record of trial.[153] In *United States v. Doherty*,[154] the court adjudged a bad conduct discharge but recommended clemency to include remission of the discharge. Upon advice of his legal officer, the convening authority approved the discharge noting that departmental instructions precluded clemency for this class of offenders. The court held that the mistaken interpretation that the policy was mandatory resulted in a failure by the convening authority to exercise his required independent evaluation of the appropriateness of the sentence.

In a similar case[155] the convening authority had determined to suspend an adjudged punitive discharge and to direct rehabilitative training for the accused. Upon advice of the staff judge advocate that the higher headquarters indicated retention of this type of offender was contrary to policy, the sentence was approved. The court held that injection of an actual or apparent command policy into the sentencing process violated Article 37 of the Code and denied the accused an individualized review.

The convening authority may be improperly influenced by members of his staff. In *United States v. Wetzel*,[156] the accused's immediate superiors recommended the accused be placed in a rehabilitative program. Thereafter, trial counsel alleged by letter that the accused had refused to cooperate with the government after trial, had falsely testified that he had been threatened with perjury by the trial counsel, had refused to testify at an accomplice's trial and thus was not a proper subject for rehabilitation. Another counsel's letter indicated that the accused had refused to testify for the defense in another case. The review of the staff judge advocate, which recommended no clemency, did not include these letters although the recommendations for clemency were included. It was held that influence upon the staff judge advocate, who is required to advise the convening authority, may directly affect the convening authority's action. It was indicated that even though these in-

153. United States v. Lansford, 6 U.S.C.M.A. 371, 20 C.M.R. 87 (1955).
154. 5 U.S.C.M.A. 287, 17 C.M.R. 287 (1954).
155. United States v. Frazier, 15 U.S.C.M.A. 28, 34 C.M.R. 474 (1964).
156. 19 U.S.C.M.A. 370, 41 C.M.R. 370 (1970).

temperate letters were not brought to the attention of the convening authority, there was a fair risk that action based on the advice was improperly influenced.

The convening authority is disqualified from reviewing a case under certain circumstances and thus may lose command control of this judicial function. In *United States v. Marks*,[157] the convening authority presided over a conference at which investigators suggested someone attempt to purchase marihuana from the accused, a suspect. The convening authority stated the job required "a good reliable marine" and personally named the person who ultimately was the principal prosecution witness. It was determined that the convening authority had passed judgment as to the credibility of the government's most important witness prior to the commission of the offense and was disqualified from reviewing the case.

The convening authority may not review a court-martial where he has granted immunity to a witness since this also involves accepting credibility.[158] Where he testifies for the prosecution upon conflicting issues he may not later review the case since it would require an evaluation of his own testimony.[159]

Although limitations exist upon command control over initial review of courts-martial, " . . . the convening authority possesses a judicial power far in excess of that which resides in any other single judicial office."[160]

VII. Proposed Legislation

Relation to Command Control

There were numerous bills introduced during the 91st Congress relating to military justice. The purpose of the bills to eliminate command control of courts-martial was expressed in the following statement:

> . . . I am introducing today 11 bills which I believe will implement the necessary changes to effect a more equitable and effective justice system for military personnel. These revisions should fully eliminate command influence from courts-martial . . .[161]

Many of the bills were reintroduced during the 92nd Congress, and will probably again be introduced in the next Congress. All proposals were aimed at establishing independent trial commands or

157. 19 U.S.C.M.A. 389, 41 C.M.R. 389 (1970).
158. United States v. White, 10 U.S.C.M.A. 63, 27 C.M.R. 137 (1958).
159. United States v. McClenny, 5 U.S.C.M.A. 507, 18 C.M.R. 131 (1955); United States v. Taylor, 5 U.S.C.M.A. 523, 18 C.M.R. 147 (1955).
160. United States v. Nix, 15 U.S.C.M.A. 578, 580, 36 C.M.R. 76, 78 (1965).
161. 116 Cong. Rec. 27218 (1970) (remarks of Senator Hatfield).

circuits and selection of court members at random; the authority and method of selecting members of courts-martial; authority to detail counsel and military judge; authority to convene and initially review courts-martial. Only those provisions directly related to the exercise of command control of courts-martial will be discussed.

The Hatfield Bills

Senator Hatfield proposed to establish armed forces judicial circuits throughout the world.[162] Each circuit would be divided into a Field Judiciary, Trial Counsel, Defense Counsel and Trial Review Section. The Trial Counsel and Defense Counsel Section would detail counsel. The Trial Review Section would review initially all courts-martial cases tried within the circuit. Military judges would be designated and assigned to the judicial circuit by The Judge Advocate General of the particular service. The judicial circuit officer would detail the military judge to individual cases. Upon request of the convening authority, the judicial circuit officer would detail an investigating officer not under the command of the forwarding officer. The judicial circuit officer might disagree with the investigating officer but if the disagreement were with a recommendation that any charge not be referred to a general court-martial, the judicial circuit officer would be required to make a written report on each issue. If either the investigating officer or the judicial circuit officer recommended against trial of any charge by general court-martial, the convening authority, if he disagreed, would be required to submit the charge to the Judge Advocate General of his service for final decision. Initial review was completely removed from the convening authority and exercised by the judicial circuit officer.

Selection of court members was to be on a random basis from courts-martial rolls.[163] At the request of the accused one-half of the court membership would be comprised of enlisted personnel; at his further request, one-half of the membership would be of the same grade and rank as the accused.

All requests for witnesses and the production of evidence were

162. S. 2171, 92d Cong., 1st Sess. (1971).
163. S. 2177, 92d Cong., 1st Sess. (1971).

to be submitted to the military judge.[164] The summary court-martial would be eliminated.[165]

Bayh and Bennett Proposals

Senator Bayh and Congressman Bennett introduced identical bills into their respective legislative bodies.[166] The bills provided for sweeping changes in the military justice system. The proposals would establish an independent courts-martial command in each military service divided into prosecution, defense, judicial and administrative divisions. All courts-martial would be convened by the Chief, Administrative Division. The Chief, Prosecution Division would refer all charges to trial. The military judge would be given all sentencing authority, power to suspend or remit, and all writ authority. The military judge would have the authority to order searches and seizures of persons or property, act on all requests to compel a witness to appear and testify and to compel production of evidence. Present provisions for initial review, action and approval by the convening authority would be repealed under this proposal.

Any member of the armed forces on active duty for one year or more would be eligible to serve as a member of a general or special court-martial. Members would be selected on a random basis from all those eligible within a geographic area. The bill would direct a study by the existing review committee to examine the possibility of eliminating the summary court-martial.

VIII. Conclusion

The development of the military justice system has seen the imposition of restrictions upon the exercise of command control of courts-martial. Commanders may exercise control over courts-martial by issuing policy directives, but directives cannot interfere with the judicial processes, nor can they remove the independent discretion of a subordinate commander. The test is whether the directive is interpreted as mandatory by the subordinate commander. Attempts to limit the prosecutorial discretion of a subordinate are merely matters of policy. Thus a policy directive concerning military justice must be limited only to recommendations. Policy declarations concerning discipline have been strictly construed by the courts. That trend will continue in the future.

164. S. 2179, 92d Cong., 1st Sess. (1971).
165. S. 2173, 92d Cong., 1st Sess. (1971).
166. S. 1127, 92d Cong., 1st Sess. (1971); H.R. 579, 92d Cong., 1st Sess. (1971).

Withdrawal or reservation of courts-martial authority is a tool of command control. Such action may be an unlawful interference with a convening authority's judicial acts. The legal basis for withdrawal or reservation is questionable. To provide a clear legal basis, a provision similar to that of the Manual must be enacted by Congress. Absent statutory basis, the proper remedy to deal with the incompetent convening authority seems to be his relief from command rather than improperly divesting him of a power granted by Congress.

The Court of Military Appeals has consistently applied the personal interest test in determining whether a convening authority is an accuser. Thus a convening authority may be an accuser where his orders are willfully disobeyed; but he is not an accuser where the charge is failure to obey his order. Such a theory is a fiction and has completely ignored the prohibition of the nominal accuser. Strict compliance with the provisions of the Code by the court is required to eliminate the appearance of command control. Otherwise, the criticism that the convening authority may prefer charges has a valid basis.

The summary court-martial is the forum most subject to command control. The amendment to the Code providing the accused with the right to refuse trial by that court and subject himself to the possibility of greater punishment has not removed that control. A court in which a commander may accuse, sit in judgment and review the same case has no place in a modern judicial system and should be eliminated.

Command control of the detailing of court members has few restrictions. The court has been inclined to restrict the mode of selection rather than the contents of the court membership. The Code directs the commander to detail those members who, in his opinion, are best qualified. To avoid the appearance of the handpicked court, the system of random selection should be adopted. The simple method of drawing names from all those within a command eligible to sit on that court could be utilized. Qualities such as age, grade and good moral character should be the governing prerequisites for eligibility. A random selection from all those eligible within a command would result in a selection of the same members as the present system without the convening authority making the selection.

The use of instructions as a tool of command control has been virtually eliminated by the Code and regulation. The use of efficiency reports to control court members, defense counsel and the military judge is prohibited. This prohibition does not apply to a subordinate convening authority who may exercise his power in an improper manner. The prohibition against the use of efficiency reports as a tool of command control is of little practical value since it is not difficult to find another basis for a poor rating.

Considerable command control may be exercised over the trial counsel by use of detailed "suggestions" concerning the conduct of his case. An order to abandon a motion to withdraw a specification is not unlawful. Trial counsel may not be used as a vehicle to convey command policy to members of the court.

Command control is exercised by detail of defense counsel. This selection process is shared with the accused who may request counsel of his own choice if reasonably available. Once counsel is detailed he cannot be relieved at the will of the convening authority or for administrative convenience.

A convening authority may return certain rulings involving questions of law to the military judge who must accede to his view. The commander retains judicial functions of a judge prior to detailing of a military judge to a court. This procedure is not compatible with the concept of a judiciary. These functions should be placed in the hands of mature judges. A record of improper exercise of judicial functions should be the basis for removal of the military judge by the Judge Advocate General.

Command control of initial review of courts-martial gives the commander greater judicial power than resides in any other single judicial office. He must exercise discretion independent from policy directives of superiors or improper action by his subordinates. An action prior to review amounting to a judgment of credibility of witnesses will disqualify the convening authority and result in loss of command control over review of a court-martial.

The development of the military justice system is a history of limiting the role of command control. Although some individuals may call for a return to systems of the past, there is no reason to believe that development of the justice system will cease in the future. The following comment illustrates the point:

> In the military, as in the civilian community, there are those who look backward, wistfully and longingly, to the "old ways" of handling the law breaker, and think how simple and effective life would be if we returned to them. . . . Human nature being what it is, there will probably always be those who regret the present,

> fear the future and sanctify the past. Fortunately for society, for most of us the past is only a prologue to the present, and the present a creative forerunner to a rewarding future.[167]

Command control over the military justice system has been an area of constant criticism. Strict interpretation of statute and court decision is a proper legal theory under which a commander and his military attorney may operate. However, the role of criticism should not be overshadowed by personal views. If our military criminal system is to remain intact, commanders and military lawyers must take the initiative. If we fail to limit the role of command control over courts-martial, it is not unlikely that Congress will take effective action.

167. Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 46 MIL. L. REV. 96 (1969).